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No. 75-478

[redacted]

October Term, 1975

PARKER SEAL COMPANY, PETITIONER,

v.

PAUL CUMMINS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

ROBERT H. BORK,
Solicitor General,

J. CARTER BEESE,
Assistant Attorney General,

LAWRENCE A. WILDER,
Deputy Solicitor General,

MARK L. EVANS,
Assistant to the Solicitor General,

BRIAN M. BARNARD,
DENNIS J. HORNEY,
JOHN S. MACKINNON,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

ARTHUR W. HELMS,
General Counsel,
JOSEPH T. EDDINS,
Associate General Counsel,
BEATRICE ROSENBERG,
CHARLES L. REISCHEL,
LOIS ALEXANDER TRAGER,
GERALD R. LIEVEN,
Attorneys,
Equal Employment Opportunity Commission,
Washington, D.C. 20506.

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CITATIONS

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QUESTIONS PRESENTED

Title VII of the Civil Rights Act of 1964 and Equal Employment Opportunity Commission Guidelines prohibit the discharge of an employee because of his religious observance or practice, unless the employer is unable reasonably to accommodate the employee's religious observance or practice without undue hardship on the conduct of the employer's business. Petitioner discharged respondent because of his religious practice

of declining to work on Saturdays. The questions presented are:

1. Whether petitioner demonstrated an inability reasonably to accommodate respondent's religious practice without undue hardship on the conduct of its business.

2. Whether the statute and guidelines violate the Establishment Clause of the First Amendment.

INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Pursuant to Title VII of the Civil Rights Act of 1964, the Attorney General and the Equal Employment Opportunity Commission have responsibility for enforcement of federal laws providing for equal employment opportunity. Although this action was brought by a private plaintiff, the issues raised are similar to those arising in suits brought by the government. The resolution of the issues presented in this case will directly affect the government's enforcement responsibilities.

The Attorney General also has responsibility for enforcement of a variety of other federal laws proscribing discrimination on account of religion, including those requiring nondiscrimination in housing (42 U.S.C. 3601 *et seq.*), public accommodations (42 U.S.C. 2000a *et seq.*), public facilities (42 U.S.C. 2000b *et seq.*), public education (42 U.S.C. 2000c–6), and certain other federally protected activities (18 U.S.C. 245).[1]

[1] In addition, Civil Service Commission Regulations on Equal Opportunity require federal agencies to make reasonable accommodations to the religious needs of applicants and employees, including those who observe the Sabbath on days other than Sunday, when accommodation can be made without undue hardship on the business of the agency. See 5 C.F.R. 713.204(g). Guidelines issued pursuant to Executive Order 11246 by the Office of Federal Contract Compliance of the Department of Labor similarly require contractors and subcontractors with the federal government, and contractors and subcontractors on federally assisted construction contracts, to make reasonable accommodations to the religious observances and practices of employees and prospective employees. 41 C.F.R. 60–50.3.

Pursuant to this interest, the United States participated as *amicus curiae* in this Court in *Dewey* v. *Reynolds Metals Co.*, 402 U.S. 689, affirming by an equally divided Court 429 F. 2d 324 (C.A. 6), which also involved the validity of an employee's discharge because of his religious observance or practice.

STATEMENT

1. Petitioner Parker Seal Company operates a factory in Berea, Kentucky, that produces rubber products (A. 57). Respondent Paul Cummins was hired as a "production scheduler" at this plant in 1958 (A. 53) and was made supervisor of the first shift of the plant's Banbury Department in 1965 (A. 55).

The Berea plant's standard work week is from Monday through Friday (A. 135). The plant is ordinarily closed Sundays (A. 135) but operates about half the Saturdays in a year (A. 132, 173, 198). Parker Seal employs about 600 persons at the plant (A. 132), 17 of whom are department supervisors (A. 186).

The Banbury Department mixes the rubber that Parker Seal uses for its products (A. 57, 189–190). It

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is connected by a sliding door to the Stock Preparation Department (A. 82). The Stock Preparation Department usually operates three shifts per day; Banbury ordinarily operates two shifts per day and occasionally a third (A. 56–57, 117–118). The Stock Preparation Department has a supervisor for each of its three shifts, but the Banbury Department has a supervisor for only its first shift (A. 57, 67, 117). Supervisors of the second and third shifts of the Stock Preparation Department also oversee the operations of the corresponding Banbury shifts (A. 57, 117). In addition, company policy requires the Stock Preparation supervisor to oversee the operations of the first Banbury shift in the absence of the Banbury supervisor (A. 117). With few exceptions, whenever the Banbury Department operates on a Saturday, the Stock Preparation Department operates as well (A. 93–94, 134).

As the supervisor of the Banbury Department, Cummins was paid a fixed salary, not an hourly wage (A. 77–78). His position was not subject to the union collective bargaining agreement that applied to Parker Seal employees who were paid by the hour (A. 79, 104–105). Cummins was a member of Parker Seal's "Cost Goal Program," an incentive program whose members were expected to exercise initiative to increase company profits (A. 80, 211–214).

Cummins became a member of the World Wide Church of God in September 1970 (A. 37, 61). The Church requires its members to refrain from working from sundown Friday to sundown Saturday (A. 37–

38, 65) and on "seven * * * annual holy days * * * that are basically the same as the Jewish holy days" (A. 39).

When respondent first began attending the Church's Saturday services in April or May 1969 (A. 39, 61), he was permitted to leave the plant early on Saturdays to attend the services (A. 62, 114, 121). In July 1970, however, shortly before he became a Church member, respondent decided that he could no longer work at all on Saturdays (A. 64). He informed Conley Saylor, Plant Manager at the time, that he would no longer be available for work on Saturdays and Church holy days but would be available to work at "any other time" (A. 64–65, 115). Cummins told Saylor that he "could name the hours or the time, what he wanted me to do and I would be glad to take care of that" (A. 65). A few days later, Saylor informed Cummins that he would be allowed to observe his Sabbath (A. 66, 115). From that time on, Cummins did not work on Saturdays or the holy days of the Church (A. 66–67).

To compensate for respondent's absence on Saturdays, Saylor directed Chester Webb, supervisor of the first shift of the Stock Preparation Department, and another supervisor to "cover" the Banbury Department (A. 116–117, 150–151). This entailed checking the Banbury Department to ensure that the employees were working and the machinery was operating (A. 103, 152). Webb was the supervisor most often required to cover for Cummins (A. 69, 151). Cummins cooperated in this accommodation by preparing

Saturday production schedules in advance so that the Banbury Department could function properly in his absence (A. 99, 105–106).

Because of economic problems at the Berea plant, L. G. Haddock replaced Saylor as Plant Manager in November 1970 (A. 172–173, 208–210). The profits of the Division that included the Berea plant had begun to decline in 1968 and reached a low in early 1970 (A. 207). In October 1970 Parker Seal laid off a large number of employees (A. 208). The economic problems at the Berea plant were caused by a decline in the national economy and deteriorating morale at the plant that affected production (A. 209). The substitution of Haddock for Saylor as Plant Manager was part of an effort by Parker Seal to improve the efficiency of the Berea plant. The productivity of the Banbury Department was significantly increased by changes subsequently made in its production methods (A. 218–219, 221–222).

Upon assuming his duties as Berea Plant Manager, Haddock was instructed to insist upon more involvement by the supervisors in plant operations (A. 210). Haddock informed Cummins that he would be allowed to continue to observe his Sabbath as long as his absence did not cause any problems (A. 69). This accommodation continued without difficulty until the latter part of the summer of 1971 (A. 71, 175).

During a four-week period in July and August 1971, at least one of the three Stock Preparation Department supervisors was scheduled to be on vacation (A. 176). The company issued a notice requiring the

two remaining Stock Preparation supervisors to work 12 hours per day during this period and indicating that Cummins was to act as a substitute for these supervisors (A. 154, 185). Haddock informed Cummins that this notice meant he was expected to volunteer to work four hours in the evening for the Stock Preparation supervisors during this period (A. 68, 185–186). Cummins notified the three Stock Preparation supervisors that he would work for them in the evenings, and he substituted for them on several occasions (A. 67–68, 141–142, 153, 155).

During the vacation period, two of the Stock Preparation supervisors complained to plant officials about Cummins's not working on Saturdays (A. 177, 186, 204). Chester Webb, the supervisor for the first shift of the Stock Preparation Department, complained about having to work for Cummins on Saturdays when the Banbury Department was operating and the Stock Preparation Department was not (A. 152–153). Oscar Fain, respondent's brother-in-law and supervisor of the third shift of the Stock Preparation Department, complained about having to work 70 hours per week while respondent worked only 40 (A. 144–145, 187–188).

Because of these complaints, Haddock asked Cummins in late August if there was any possibility he would change his religious beliefs (A. 71, 178). Cummins replied that his religious beliefs were firm (A. 71–72, 178). Without further discussion, Haddock fired Cummins shortly thereafter, on September 3, 1971 (A. 72, 178).

2. Cummins filed complaints of religious discrimination with the Equal Employment Opportunity Commission and the Kentucky Commission on Human Rights. The Kentucky Commission held an evidentiary hearing in March 1972 (A. 21–241). It dismissed Cummins's charge in April 1972, holding that Parker Seal could not have accommodated respondent's religious needs without imposing an undue hardship on the conduct of its business (Pet. App. 1a–6a). Cummins did not appeal from the dismissal (Pet. App. 8a).

Cummins was thereafter issued a right-to-sue letter by EEOC; he filed this action in September 1972 in the United States District Court for the Eastern District of Kentucky (A. 1–5). The parties stipulated that the transcript of the Kentucky Commission hearing would serve as the factual record in the district court (Pet. App. 15a). In a brief opinion issued in March 1974, the district court ruled that Parker Seal was justified in discharging Cummins, holding that the company had reasonably accommodated his religious needs and that further accommodation could not have been made without undue hardship (Pet. App. 7a–9a).

3. The court of appeals reversed. It noted that the district court "did not specify what 'undue hardship' would have resulted [from continued accommodation of respondent's religious practices] and did not explain why an accommodation that was reasonable for over a year * * * suddenly became unreasonable in September 1971" (Pet. App. 20a). After a detailed review of the evidence, the court of appeals determined that the major reason for respondent's discharge was that his "fellow supervisors resented having to work on Saturdays while [respondent] was not forced to do so" (Pet. App. 28a). Although the court recognized that "employee morale problems could become so acute that they would constitute an undue hardship" (Pet. App. 29a), it characterized the supervisors' complaints in this case as "mild and infrequent" and found that Parker Seal "might have alleviated at least some of the dissension if it had pursued a more active course of accommodation" (*ibid.*).

The court concluded that Parker Seal "did not reasonably accommodate [respondent's] religious practices and * * * has not shown that such an accommodation would have imposed an undue hardship on the conduct of its business" (Pet. App. 30a–31a). It accordingly held that, by discharging Cummins, the company "discriminated against him on the basis of his religion in violation of Title VII" (Pet. App. 31a).

The court also ruled that the reasonable accommodation requirement does not violate the Establishment Clause of the First Amendment (Pet. App. 31a–40a). The court applied the three-part test established by this Court in *Committee for Public Education* v. *Nyquist*, 413 U.S. 756, for determining whether a law violates the Establishment Clause (Pet. App. 32a–33a). Under that test, in order to comply with the Establishment Clause a law must reflect a clearly secular purpose, must have a primary effect that neither

advances nor inhibits religion, and must avoid excessive government entanglement with religion (413 U.S. at 772–773).

The court of appeals held that the reasonable accommodation rule is supported by an adequate secular purpose because, "like Title VII as a whole, [it] was intended to prevent discrimination in employment" (Pet. App. 33a). The primary effect of the rule neither advances nor inhibits religion, the court stated, because the rule "guarantees job security" by "restrain[ing] employers from enforcing uniform work rules that, although facially neutral, discriminate in effect against employees holding certain religious convictions" (Pet. App. 36a). The court held that the rule avoids excessive government entanglement with religion since it "require[s] little or no contact between religious institutions and governmental entities" (Pet. App. 38a).

The court remanded the case to the district court for a determination of appropriate relief, noting that the district court should consider reinstatement, back pay, and attorney's fees (Pet. App. 40a).

Judge Celebrezze dissented on the ground that, in his view, the reasonable accommodation rule violates the Establishment Clause (Pet. App. 41a–57a).

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 703(a)(1) of the Civil Rights Act of 1964, 78 Stat. 255, 42 U.S.C. 2000e–2(a)(1), provides that it is an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any

individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's * * * religion * * *." Section 701(j) of the 1964 Act, as added by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. (Supp. V) 2000e(j), defines "religion" to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." The Equal Employment Opportunity Commission's Guidelines on Discrimination Because of Religion, in effect since 1967, embody a similar standard.[2]

I

The issues in this case are sharply focused. The parties do not dispute that Parker Seal discharged Cummins because of his refusal to work on Saturdays and that his refusal to work on Saturdays is a sincere "religious observance or practice" within the meaning of Section 701(j) of the Act.[3] Whether Parker Seal

[2] The Guidelines impose on an employer the obligation "to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business." 29 C.F.R. 1605.1(b).

[3] Cummins was discharged in September 1971, prior to the 1972 enactment of Section 701(j). However, the complaint in this case was filed after that section became law, and the 1967 EEOC Guidelines requiring reasonable accommodation (see note 2, *supra*) were in effect at the time of Cummins's discharge. In these

committed an unlawful employment practice—that is, whether it discharged Cummins because of his "religion"—thus turns on whether the company demonstrated that it was unable reasonably to accommodate Cummins's Saturday absences without undue hardship in the conduct of its business.

That factual issue was, in our view, correctly resolved by the court of appeals, which concluded, after an exhaustive review of the record, that Parker Seal did not make the required showing and that its discharge of Cummins therefore violated the Act's prohibition against religious discrimination. The court's conclusion is fully supported by the record.

The company initially satisfied its Title VII obligations by excusing Cummins from work on Saturdays and arranging for supervisors from the adjoining Stock Preparation Department to "cover" for Cummins (who prepared his department's Saturday work schedules in advance) by checking the Banbury Department to ensure that the men were working and the machinery was operating. A continuation of this reasonable accommodation of Cummins's religious practices would not have imposed an undue hardship on the conduct of Parker Seal's business.

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circumstances, the constitutionality and application of both the statute and the Guidelines are properly before the Court. *Cort* v. *Ash*, 422 U.S. 66, 74–77; *Bradley* v. *Richmond School Board*, 416 U.S. 696, 711; *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268, 281–283; *The Schooner Peggy*, 1 Cranch 103, 110. The parties do not contest the applicability of Section 701(j) (see Pet. Br. 17–18, n. 9).

Although the company was experiencing economic difficulties at its Berea plant at the time of Cummins's dismissal, those difficulties were due in large measure to a decline in the national economy and were not related to Cummins's absences from work because of his religion. The court of appeals correctly held that the complaints of two Stock Preparation supervisors about Cummins's not working on Saturdays did not demonstrate that continued accommodation of his religious needs would have caused an undue hardship on Parker Seal's business. The complaints were mild and infrequent, and they occurred during a period when the Stock Preparation supervisors were required to work extra hours at the plant because other supervisors were on vacation. Parker Seal made no effort to use other available means (such as increased substitution of Cummins for other supervisors during the week) to minimize the discontent of respondent's fellow supervisors, but instead summarily fired him after he advised the Plant Manager that his religious beliefs were firmly fixed.

II

It follows that Cummins is entitled to appropriate relief under the Act, unless, as Parker Seal alternatively argues, the Act and the EEOC Guidelines, as interpreted by the court of appeals, violate the Establishment Clause of the First Amendment insofar as they impose on the company an obligation to make reasonable accommodations to an employee's religious observance or practice.

A. If, as Parker Seal apparently concedes (Br. 24, 40), Congress may validly proscribe sophisticated as well as obvious means of religiously discriminatory employment practices by private employers, and if, as this Court has held, Title VII is directed to the consequences and not merely the motivation of employment practices, then it follows that the reasonable accommodation requirement does not violate the Establishment Clause. For it does no more than state a standard by which to determine whether, in a particular case, an employment practice with religiously discriminatory consequences is justified by substantial business need. An employer's obligation to accommodate his employees' religious needs derives from his basic obligation to avoid religious discrimination in employment.

B. This Court's Establishment Clause decisions make clear that a government employer could properly make reasonable accommodations to those of its employees whose religious beliefs or observances conflict with normal work schedules, even if the schedules of other employees might have to be adjusted as a consequence. That would reflect a permissible "neutrality in the face of religious differences" and would not "serve to abridge any other person's religious liberties" (*Sherbert* v. *Verner*, 374 U.S. 398, 409). It is not an establishment of religion for public institutions to make "adjustments of their schedules to accommodate the religious needs of the people" (*Zorach* v. *Clauson*, 343 U.S. 306, 315). It is no more an establishment of religion for the government to require pri-

vate employers to do the same thing. In neither case is there any departure from the principle of neutrality. Congress may validly seek to accommodate free exercise values by eliminating unnecessary burdens on the practice of religion and avoidable clashes with the dictates of conscience.

C. The reasonable accommodation requirement satisfies the tripartite test devised by this Court for determining whether a challenged law violates the Establishment Clause: it reflects a clearly secular purpose, it has a primary effect that neither advances nor inhibits religion, and it avoids excessive government entanglement with religion.

The purpose and effect of the reasonable accommodation requirement are the same as those of Title VII as a whole—"to achieve equality of employment opportunities" and to "remov[e] * * * artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of * * * impermissible" criteria. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429, 431. Congress has properly determined that an individual's religion, as well as his race, nationality, and sex, should not affect his employment opportunities except in the rare instance when it significantly affects his job qualifications. The reasonable accommodation requirement represents a permissible legislative effort—clearly secular in purpose and effect—to identify the circumstances in which it may fairly be said that an individual's religious practices are sufficiently relevant to his job qualifications that they may properly be taken into account in

connection with an employment practice. The requirement's primary effect neither advances nor inhibits religion; rather, it removes an artificial barrier to equal employment opportunity by making religion an "irrelevant" employment criterion (*Griggs, supra,* 401 U.S. at 436) except to the limited extent that a person's religious practice significantly and demonstrably affects the employer's business.

The requirement entails no substantial government entanglement with religion. The central factual inquiry under the statute—whether the employer can reasonably accommodate an employee's religious practice without undue hardship—implicates industrial, not religious, considerations, and any unavoidable "entanglement" that may occasionally result when a religion's practices or an employee's sincerity is put in issue is likely to be minimal.

In sum, the reasonable accommodation requirement itself represents a reasonable accommodation of the values embodied in the Free Exercise and Establishment Clauses. Although the legislative solution is not compelled by either clause, neither is it forbidden.

ARGUMENT

I

PARKER SEAL HAS NOT DEMONSTRATED THAT IT IS UNABLE REASONABLY TO ACCOMMODATE RESPONDENT'S RELIGIOUS PRACTICE WITHOUT UNDUE HARDSHIP ON THE CONDUCT OF ITS BUSINESS

Since the district court failed to make specific findings in support of its conclusion that Parker Seal had

shown it was unable reasonably to accommodate respondent's religious practices without undue hardship, the court of appeals undertook an independent examination of the record (Pet. App. 20a). It concluded that whatever "inconvenience" or "hardship" the company may have experienced did not amount to "undue hardship" under an appropriate interpretation of the statute and Guidelines, and that, to the extent the district court's opinion rested on a finding of "undue hardship," the finding was "clearly erroneous" (Pet. App. 30a). The court of appeals further found that Parker Seal had not taken reasonable steps available to it to minimize the inconvenience it was experiencing and thereby to accommodate respondent's Saturday absences (Pet. App. 29a–30a). In our view, the court's rulings are correct.

1. For more than a year—from July 1970 to September 1971—Parker Seal reasonably accommodated respondent's religious practices by excusing him from work on Saturdays and arranging for supervisors of the adjacent Stock Preparation Department to oversee the Banbury operation in his absence. That oversight entailed no substantial burden. The Stock Preparation supervisors merely checked the Banbury Department to ensure that the employees were working and the machinery was operating (A. 103, 152).

This was not an extraordinary departure from usual operating procedures. Even before Cummins became a member of the World Wide Church of God, it had been company policy to have the Stock Preparation supervisors cover for the Banbury supervisor on the

plant's second and third shifts and at other times when the Banbury supervisor was absent (A. 117, 130).

Nor is there any evidence showing that the procedure adversely affected the plant's efficiency. Cummins cooperated in the procedure by preparing Saturday work schedules in advance (A. 89, 99, 105–106), and he testified that, with proper scheduling, the Banbury Department could be run with equal efficiency in his absence (A. 89). The Banbury workers were well trained and knew that Cummins could determine from graphs and charts whether they had worked up to capacity in his absence (A. 103). The former Plant Manager testified that respondent's Saturday absences did not affect the efficiency or productivity of the Banbury operation (A. 131).[4] Similarly, although there was always a possibility that an accident could occur in the department as a result of a mechanical breakdown, the presence or absence of the Banbury supervisor would not affect that possibility (A. 89).

In sum, the company's accommodation of respondent's religious practices placed no "unreasonable strain on its business" (Pet. App. 30a).

2. The court of appeals found—and the company does not contest the finding—that "the major reason

[4] Although the succeeding Plant Manager (the one who discharged Cummins) stated that Cummins "had to be there if that department was to function the way it should" (A. 180), he was unable to say, without "look[ing] at my figures," whether respondent's Saturday absences resulted in reduced efficiency for the Banbury Department (A. 189–190). The record does not indicate what those figures would have reflected.

for [respondent's] discharge" was that his "fellow supervisors resented having to work on Saturdays while [Cummins] was not forced to do so" (Pet. App. 28a). If Parker Seal had shown that its accommodation of respondent's Saturday absences had caused "'a serious morale problem'" (Pet. Br. 51) that significantly affected the plant's operation and that could not reasonably have been rectified by means other than discharging Cummins, then the company might well have met its burden of showing "undue hardship." The record here, however, fully supports the court of appeals' determination that Parker Seal's "employee morale problems" were not nearly "so acute that they would constitute an undue hardship" (Pet. App. 29a).

Respondent's discharge was precipitated by the complaints of only two of the plant's 17 supervisors. Chester Webb complained that he was the only supervisor required to substitute for Cummins on Saturdays when the Banbury Department was operating and the Stock Preparation Department was not (A. 152–153). That occurred only a few times a year (A. 69, 93–94, 134). Webb apparently did not object to covering the Banbury Department for Cummins on those Saturdays when both the Stock Preparation and Banbury Departments were operating (A. 153).

Oscar Fain, the other complaining supervisor, objected to working 70 hours per week in July and August 1971 when Cummins allegedly was working

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only 40 hours but earning more money (A. 187–188).[5] The Plant Manager testified that Fain's dissatisfaction was due in part to the fact that he had recently been made an "exempt employee," a status that entitled him to a higher base pay but made him ineligible to draw overtime wages (A. 188).

These complaints—correctly characterized by the court of appeals as "both mild and infrequent" (Pet. App. 29a)—do not signify a "smoldering resentment among Cummins' fellow supervisors" (Pet. Br. 9) and do not amount to an "undue hardship." See *Draper* v. *U.S. Pipe & Foundry Co.*, 527 F. 2d 515 (C.A. 6); *Hardison* v. *Trans World Airlines, Inc.*, 527 F. 2d 33 (C.A. 8), pending on petition for a writ of certiorari, No. 75–1126.

The complaints apparently grew out of a temporary situation in which a combination of scheduled vacations and heavy production requirements resulted in extraordinary burdens upon supervisory employees (A. 176–177). Those burdens might well have produced similar complaints even if Cummins had been working on Saturdays. They would have subsided in any event when all three Stock Preparation supervisors were again available for work—so that each would be required to work only 48, instead of 72, hours per week.

Furthermore, as the court of appeals correctly found (Pet. App. 29a–30a), Parker Seal could have

[5] The record suggests that Cummins was in fact working more than 40 hours per week during this period, filling in for other supervisors who were on vacation or who needed relief (A. 67–68, 141, 155).

taken reasonable steps to prevent or alleviate at least some of the dissatisfaction expressed by Webb and Fain. It would have been simple, fair, and fully consistent with Title VII to require Cummins to work extra hours at the Stock Preparation Department during the summer vacation period of July and August 1971, when the Stock Preparation supervisors were working as many as 72 hours per week. If Cummins had been assigned an additional 16 hours per week, for example, the overtime burdens on the other supervisors could have been substantially reduced.

The Plant Manager admitted that the temporary overtime problem would have been alleviated if Cummins had worked additional hours, but he considered it preferable to rely on a voluntary arrangement (A. 184–186, 202–203). Although Cummins repeatedly offered to substitute for the Stock Preparation supervisors (A. 67–68, 141–142, 153) and in fact did substitute for them on several occasions (A. 67–68, 141, 153, 155), the voluntary arrangement did not fully succeed. At least one of the supervisors was reluctant to accept respondent's offer to substitute because he thought that it was not "my place to tell [Cummins] to work for me" (A. 141); the supervisor believed that the Plant Manager should have made the work assignment (A. 142).

Even apart from the extraordinary situation in the summer of 1971, the company could easily have assigned Cummins to additional hours of work during the week on a permanent basis to compensate for his Saturday absences. Since the Stock Preparation

supervisors who covered for Cummins on Saturdays could thereby have been relieved of some work obligations during the week, it is reasonable to suppose that the arrangement would have allowed Cummins to observe his Sabbath without causing significant discontent among the other supervisors. Nothing in the record suggests that an equitable arrangement of this sort was even considered by the company, much less that it could not be implemented without undue hardship.[6]

The record is also silent on whether the company could have assigned supervisors from outside the Stock Preparation Department to cover the Banbury Department on the few Saturdays when Banbury was operating and Stock Preparation was not.[7] If so, Chester Webb's complaint (p. 19, *supra*) might have been eliminated.

3. Parker Seal suggests, without actually asserting, that the company's accommodation of respondent's

[6] Plant Manager Haddock testified that during the week, when the Banbury Department was operating, "I would gain nothing by pulling [Cummins] out of there and putting him in Stock Prep" (A. 198). But that does not answer our point. The fact that Cummins could not be used more effectively as a substitute during his normal working hours does not mean that he could not relieve the Stock Preparation supervisors by working additional hours, before or after his normal shift, each day of the week except Saturday. That arrangement would have allowed Cummins to make up during the week the time that he took off on Saturdays and would have compensated the Stock Preparation supervisors for their extra duties in covering for Cummins on Saturdays.

[7] Since Cummins prepared the Saturday work schedules in advance (A. 99, 105–106), all that was required of a supervisor covering the Banbury Department on Saturday was to make sure that the men were working and that the machinery was functioning (A. 103, 152).

Saturday absences was causing undue hardship by contributing to the plant's deteriorating profitability (Br. 7–10, 43, 52). The record shows, however, that the Berea plant's financial difficulties were neither caused nor aggravated by the accommodations to Cummins.

The plant's economic decline began in late 1968 and reached a low point in 1969 or early 1970 (A. 207). Cummins did not begin observing his Sabbath by refraining from work on Saturdays until July 1970 (A. 64). The plant's problems were caused in part by a general decline in the national economy and in part by low morale and decreased output at the Berea plant (A. 209). The morale problems were caused by "a fear that the older employees were going to be replaced by people that [the company] would bring in from the outside" (A. 224)—hardly a fear to be alleviated by the firing of Cummins after 13 years of employment with the company.

The company's Division Manager testified that the low productivity of the Banbury Department was significantly improved in 1970 and 1971 through changes in production methods and because of his personal attention to the Department's operation (A. 218–219, 221, 223). Nothing in the record suggests that respondent's absence from work on Saturdays contributed to the plant's economic difficulties. Indeed, the Division Manager, whose work at the plant gave him personal knowledge of Cummins's performance as Banbury supervisor, testified that Cummins "was an interested employee and willing to co-operate"—"one of the stronger Foremen that we had" (A. 222).

4. Even if Parker Seal had demonstrated that it could not, without undue hardship, continue to accommodate Cummins's religious absences from his position in the Banbury operation, that would not by itself justify terminating his employment. If an employer is unable reasonably to accommodate an employee's religious practices in his existing position, it may be able to do so by transferring him to another position. Cf. *Draper* v. *U.S. Pipe & Foundry Co., supra,* 527 F. 2d at 519–520; *Johnson* v. *United States Postal Service,* 497 F. 2d 128, 130 (C.A. 5); *Dixon* v. *Omaha Public Power District,* 385 F. Supp. 1382, 1386 (D. Neb.); *Claybaugh* v. *Pacific Northwest Bell Tel. Co.,* 355 F. Suppl. 1, 5 (D. Ore.).

No effort was made to find Cummins another position in the Parker Seal organization where his religious practices could reasonably be accommodated. The company asserts that a collective bargaining agreement prevented it from transferring Cummins to a lower grade (Br. 10 n. 5, 54). In support of its assertion, however, the company cites only Cummins's testimony that Haddock told him there were supposed to be no "downgrades" (A. 72, 99). That testimony is not proof that a collective bargaining agreement prohibited a transfer to a lower grade. Indeed, the record suggests the contrary: as a supervisor, he was not subject to the provisions of the company's collective bargaining agreement with its union (A. 79, 104–105).[8]

[8] This case therefore does not present the question of the proper relationship between the reasonable accommodation requirement and a union collective bargaining agreement. Cf. *Cooper* v. *General Dynamics, Convair Aerospace Div.,* 533 F. 2d 163, 166–170 (C.A. 5); *Yott* v. *North American Rockwell Corp.,* 501 F. 2d 398, 403–404 (C.A. 9); *Draper* v. *U.S. Pipe & Foundry Co., supra,* 527 F. 2d at 522; *Hardison* v. *Trans World Airlines, Inc., supra,* 527 F. 2d at 42–43; *Shaffield* v. *Northrop Worldwide Aircraft Services, Inc.,* 373 F. Supp. 937, 942 (M.D. Ala.).

Moreover, even if Cummins could not have been transferred to a lower grade, there is no evidence that the company made any effort to determine the availability of other supervisory positions at Cummins's level that either did not entail Saturday work or would have been better suited to regular Saturday substitution.

We therefore conclude, on this record, that Parker Seal's discharge of Cummins violated the reasonable accommodation requirement of Title VII.

II

THE REASONABLE ACCOMMODATION REQUIREMENT DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

A. THE ACKNOWLEDGED POWER OF CONGRESS, CONSISTENT WITH THE FIRST AMENDMENT, TO PROHIBIT RELIGIOUSLY DISCRIMINATORY EMPLOYMENT PRACTICES BY PRIVATE EMPLOYERS COMPREHENDS THE AUTHORITY REASONABLY TO DEFINE THE CONDUCT THAT CONSTITUTES SUCH DISCRIMINATION

Our Establishment Clause analysis begins with the premise—unchallenged by Parker Seal (see Br. 40)—that Title VII's basic prohibition against religiously discriminatory employment practices by private employers is a proper exercise of congressional power

under the Commerce Clause[9] and is not a "law respecting an establishment of religion." Parker Seal also acknowledges that Congress may validly prohibit "sophisticated as well as simple-minded modes of religious discrimination" (Br. 24). And it is settled that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation"; the Act's thrust is directed "to the *consequences* of employment practices, not simply the motivation" (*Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431, 432; emphasis in original).

It follows, in our view, that the reasonable accommodation provision at issue here does not violate the Establishment Clause, for it does no more than define "religion" in a way reasonably calculated to ensure that even those employment practices whose religiously discriminatory consequences are subtle rather than obvious are effectively covered by the Act's basic prohibition.

Section 703(a)(1) makes it unlawful for an employer to discharge an employee "because of such individual's * * * religion." It would be the most obvious violation of that proscription were an employer to discharge an employee simply because he found the employee's religious beliefs personally repugnant. It would also be an obvious violation to base a discharge on a personal distaste for the em-

[9] See 110 Cong. Rec. 1528, 7207–7212. Cf. *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241; *Katzenbach* v. *McClung*, 379 U.S. 294.

ployee's religious practices, if the practices were conducted outside the employment relationship and did not affect in any way the employee's job performance. With these propositions Parker Seal would doubtless take no issue.

The inquiry becomes more difficult when the employee's religious beliefs dictate a form of observance that would interfere to some degree with the normal performance of his job duties. It seems clear enough, to take the most extreme example, that when an employee refuses to work at all because his religious beliefs forbid it, the employer's decision to discharge the employee would not constitute discrimination on the basis of the employee's religion. In that case there would be no means of accommodating the employee's religious observance while still maintaining the employment relationship.

At the other end of the spectrum are religious observances that may occasion the most insignificant interference with job performance. An employee's beliefs may require, for example, that he interrupt his work once or twice a day for a few moments of prayer or meditation. Common sense tells us that to discharge an employee because of such momentary interruptions may be viewed as having religiously discriminatory consequences, unless, in the particular employment context, even the briefest pause for meditation necessarily produces a work disruption sufficiently substantial to justify the conclusion that the employer's insistence on abandonment of the practice has "a manifest relationship to the employment in

question" (*Griggs* v. *Duke Power Co., supra,* 401 U.S. at 432).

It is not clear to us whether Parker Seal would agree or disagree with that statement. On the one hand, the company refers with approval to decisions that seem to support the view that, at least in certain situations, an employer's refusal to accommodate an employee's religious observances during normal working hours may amount to discrimination on the basis of religion (Br. 24–25, n. 15). On the other hand, the company repeatedly asserts that an employer may not validly be compelled "to alter his practices" to accommodate an employee's "religious practices [that] conflict with job-related work schedules" (Br. 14).

Does the company mean to say that even the most insignificant "conflict" can justify a discharge and that Congress is powerless to prevent it even when only the most minimal accommodation would be required? If so, its position is untenable. For if (as Parker Seal admits) Congress may properly prohibit subtle as well as obvious religious discrimination in employment, and if (as *Griggs* v. *Duke Power Co.* teaches) Congress may properly focus on the discriminatory consequences of employment practices and not merely on instances of intentional discrimination, then there is no reason why its power must come to an abrupt end once it may be said that the employee's religious practices affect "job-related work schedules" (Pet. Br. 14). If the conflict between a religious observance and work schedules is minimal or can easily be avoided, Congress may validly proscribe, as religiously discriminatory, a discharge or other adverse employment action on the basis of that religious observance. To deny that Congress has that power is to say that the First Amendment sanctions religious discrimination in private employment so long as the religion is manifested, no matter how insubstantially, in work-related conduct. If this is Parker Seal's position, it should be rejected.

If, instead, the company is prepared to concede that some accommodation may validly be required with respect to some religious practices, then on what basis does it challenge the formulation chosen by Congress? One may imagine a broad spectrum of work-related religious observances, from a refusal to work at all to a momentary pause for silent prayer. The legislative task is to distinguish among those practices that are, and those that are not, sufficiently disruptive of the employment relationship to warrant the employee's discharge from employment. If a practice is not sufficiently disruptive—that is, if the "conflict" of which Parker Seal speaks (Br. 14) is, in context, relatively insubstantial—then a discharge on that basis may properly be prohibited on the ground that its religiously discriminatory consequences are not justified by any substantial business need. Cf. *Griggs* v. *Duke Power Co., supra,* 401 U.S. at 431–432.

In formulating a standard for differentiating between permissible and impermissible employment practices based on work-related religious observances, Congress drew upon the criteria of reasonableness—deeply entrenched in our legal tradition—and business

need—the "touchstone" of Title VII (*Griggs, supra,* 401 U.S. at 431). The 1972 amendment defined "religion" to include "all aspects of religious observance and practice * * * unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. (Supp. V) 2000e(j).

Reasonable persons may perhaps disagree over whether this is the best formulation of the standard—or indeed over whether it was wise of Congress to legislate the standard at all (or to authorize its formulation by the Equal Employment Opportunity Commission) rather than leaving the matter for development by the courts (see Pet. Br. 24–26). But those questions are properly within the scope of congressional authority to resolve. Unless the Establishment Clause altogether bars Congress from protecting private employees from discharges based upon religious observances, even when the observances bear only insubstantially upon work performance, then Congress has the constitutional authority reasonably to determine the circumstances in which such a discharge will be permitted.

Any such determination, of course, will have the effect of imposing certain obligations on employers to adjust their practices to avoid religiously discriminatory consequences. But if, as here, the congressional standard is reasonable, the Establishment Clause is no more violated by the imposition of such an obligation

than it is by Title VII's imposition of what Parker Seal calls "the fundamental duty to avoid [religious] discrimination in employment" (Br. 14). The obligation to accommodate is no more than a reasonable and proper application of the obligation to avoid religious discrimination in employment generally.

B. THE REASONABLE ACCOMMODATION PROVISION PROPERLY PROTECTS INDIVIDUALS FROM THE IMPOSITION OF UNNECESSARY EMPLOYMENT BARRIERS THAT WOULD OTHERWISE BURDEN THE EXERCISE OF THEIR RELIGION; IT REQUIRES NOTHING MORE THAN NEUTRALITY IN THE FACE OF RELIGIOUS DIFFERENCES

Parker Seal's Establishment Clause argument, at bottom, is that any law requiring one individual to adjust his conduct in order to accommodate himself to another individual's religious observances has the impermissible effect, no matter how reasonable the required accommodation may be, of establishing the religion to which the accommodation is required (see Pet. Br. 13–14, 16, 18–19 n. 10, 27–28). Title VII's reasonable accommodation provision is invalid, according to the company's analysis, because it compels private employers to adjust their business practices to accommodate the religious observances of their employees.

The company has cited no decision of this Court to support the proposition that any law requiring the alteration of private conduct in deference to the religious needs of others is an impermissible establishment of religion. On the contrary, the company's analysis is incompatible with the principles of this Court's Establishment Clause decisions.

We start with the principle that a State may—and in some cases must—exempt from the operation of a facially neutral condition or requirement persons whose sincere religious beliefs or practices would be burdened by its application to them. *Sherbert* v. *Verner,* 374 U.S. 398, is the most pertinent illustration of the principle. The Court there invalidated, as an unconstitutional burden on the free exercise of religion, a state law denying unemployment compensation benefits to a member of the Seventh-Day Adventist Church because of her refusal, in accordance with the tenets of her religion, to accept employment requiring Saturday work. The Court held that the State could not, consistently with the Free Exercise Clause, force a sincere Saturday Sabbatarian "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand" (374 U.S. at 404).

Apart from its free exercise holding, the Court in *Sherbert* also considered whether the Establishment Clause barred imposing on the State the duty to exempt from its usual eligibility requirements any claimant whose unavailability for Saturday work was due to religious observance. The Court declared: "In holding as we do, plainly we are not fostering the 'establishment' of the Seventh-Day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious

differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall" (374 U.S. at 409).

Even the two dissenting Justices (Mr. Justice Harlan, joined by Mr. Justice White)—who objected to the Court's free exercise holding on the ground that it would require the State to *"single out* for financial assistance those whose behavior is religiously motivated, even though it denies such assistance to others whose identical behavior (in this case, inability to work on Saturdays) is not religiously motivated" (374 U.S. at 422; emphasis in original)—believed that under the Establishment Clause "it would be a permissible accommodation of religion for the State, if it *chose* to do so, to create an exception to its eligibility requirements for persons like the appellant" (*ibid.*; emphasis in original). "The constitutional obligation of 'neutrality,' " the dissenting Justices stated, "is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation" (*ibid.*).

Two years earlier, in *Braunfeld* v. *Brown,* 366 U.S. 599, the Court had upheld the constitutional validity of Pennsylvania's Sunday closing law as applied to retail merchants whose religious beliefs—like those of Mrs. Sherbert—precluded them from working on Saturdays. Although the Court divided over whether the Free Exercise Clause *required* the State to exempt Saturday Sabbatarians from the operation of the Sunday closing laws, no Justice doubted that the Es-

tablishment Clause permitted a State voluntarily to provide such an exemption. Indeed, the plurality opinion, recognizing that several States had in fact taken that approach, observed that "this may well be the wiser solution to the problem" (366 U.S. at 608).[10]

Finally, in *Wisconsin* v. *Yoder,* 406 U.S. 205, the Court ruled that the Free Exercise Clause precluded the application of Wisconsin's compulsory school-attendance law to Amish parents who sincerely believed that high school attendance for their children was contrary to their religion. The Court, relying on *Sherbert,* rejected the suggestion that "recognizing an exemption for the Amish from the State's system of compulsory education constituted an impermissible establishment of religion" (406 U.S. at 234–235, n. 22). "Accommodating the religious beliefs of the Amish," the Court stated, does not "support, favor, advance, or assist the Amish," but simply "allow[s] their centuries-old religious society * * * to survive free from the heavy impediment compliance with the Wisconsin compulsory-education law would impose" (*ibid.*).

If it is not an establishment of religion for a State to pay unemployment compensation benefits to a claimant who, but for his religious beliefs and ob-

[10] See also Mr. Justice Frankfurter's separate opinion, joined by Mr. Justice Harlan, in *McGowan* v. *Maryland*, 366 U.S. 420, 459, which applied also to *Braunfeld:* "However preferable, personally, one might deem such an exception [for Saturday Sabbatarians], I cannot find that the Constitution compels it" (366 U.S. at 520).

servances, would be denied benefits, and if it is not an establishment of religion for a State to carve out an exception from its Sunday closing laws or compulsory education laws for persons who, but for their religious beliefs and observances, would be required to conform to those laws, then would it be an establishment of religion for a state, in its role as an employer, to make reasonable accommodations to those of its employees whose religious beliefs or observances conflict with normal work schedules? Would it be permissible, for example, for a State agency to excuse a Seventh-Day Adventist from regularly scheduled Saturday work if, without undue hardship to the conduct of the agency's operations, it could arrange for other employees to cover for the absent individual?

The answer, in our view, is clear. For if a State were unable to make such an accommodation, the Seventh-Day Adventist employee would be subjected to the same kind of burden on the exercise of his religion to which Mrs. Sherbert was subjected by the operation of South Carolina's eligibility requirements for unemployment compensation benefits. Like Mrs. Sherbert, the employee would be forced to "choose between following the precepts of [his] religion and forfeiting benefits [government employment], on the one hand, and abandoning one of the precepts of [his] religion in order to accept [keep] work, on the other hand" (374 U.S. at 404). Whether or not the Free Exercise Clause would require the State to relieve its employee of this burden, the Court's decisions make clear that the Establishment Clause would not pro-

hibit the State from doing so. Here, no less than in *Sherbert*, accommodating the Seventh-Day Adventist would involve nothing more than "neutrality in the face of religious differences" (*id.* at 409).

Nor would it be any more an establishment of religion because the State might have to adjust the work schedules of other employees to accommodate their colleague's Saturday absences. An adjustment of that sort would not "serve to abridge any other person's religious liberties" (*ibid.*), and, as this Court stated in *Zorach* v. *Clauson,* 343 U.S. 306, 315, the Establishment Clause does not mean that "public institutions can make no adjustments of their schedules to accommodate the religious needs of the people." On the contrary, the Court stated, when a State "cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs" (343 U.S. at 314).

The Court in *Zorach* upheld the validity of a public school "released time" program, even though one of the "adjustments" made necessary by the program required the teachers and students who remained in school during the "released time" period to suspend normal school activities to assure that "the nonreligious attendants [would] not forge ahead of the church-going absentees" (343 U.S. at 324; dissenting opinion of Mr. Justice Jackson). *Zorach* alone thus answers Parker Seal's contention that requiring one person to accommodate the religious observances of another is a violation of the Establishment Clause. Such a re-

quirement, if otherwise reasonable, is not an establishment of religion as long as it does "not make a religious observance compulsory" and does "not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction" (343 U.S. at 314).[11]

If, therefore, a State does not establish religion when it reasonably accommodates the religious observances of its own employees (and requires other state employees to make the necessary adjustments), we see no basis for concluding that it violates the Establishment Clause when it requires private employers to do the same thing. In neither case is there any prohibited advancement of religion or any interference with the religious liberty of others. In each, the reasonable accommodation reflects, as in *Sherbert,* "neutrality in the face of religious differences" (374 U.S. at 409). If the government may validly and neutrally relieve its own employees of a burden on the exercise of their

[11] Thus, a selective service law that exempts religious conscientious objectors from military conscription does not violate the Establishment Clause (*Selective Draft Law Cases*, 245 U.S. 366, 389–390; see *Welsh* v. *United States*, 398 U.S. 333, 369–374 (dissenting opinion); *Gillette* v. *United States*, 401 U.S. 437), even though that religious exemption inevitably requires some other person, in deference to the objector's religious beliefs, to adjust his own conduct to the point of entering military service in place of the objector. Similarly, a state law "forbidding certain activities to be conducted within a set distance from a place of public worship" on Sundays—a prohibition that requires a more direct, if less consequential, accommodation by private persons to the religious practices of others—was sustained by this Court in *Gallagher* v. *Crown Kosher Super Market*, 366 U.S. 617, 627. "[B]ecause the State wishes to protect those who do worship on Sunday does not mean that the State means to impose religious worship on all" (*ibid.*; plurality opinion).

religion, there is no Establishment Clause bar to extending the same protection to private employees.

It is irrelevant that "Parker Seal cannot be equated with a sovereign State or with the Federal Government" (Pet. Br. 39) and therefore that "the Constitution does not require [the company] to assure the free exercise of [its] employees' religions" (*id.* at 38). Congress is not forbidden to foster an environment, in private industry as well as public employment, that is hospitable to "as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary" (*Zorach* v. *Clauson, supra,* 343 U.S. at 313). Quite apart from what the Free Exercise Clause may require, "it is hardly impermissible for Congress to attempt to accommodate free exercise values, in line with 'our happy tradition' of 'avoiding unnecessary clashes with the dictates of conscience'" (*Gillette* v. *United States,* 401 U.S. 437, 453).

As this Court stated in *Walz* v. *Tax Commission,* 397 U.S. 664, 669, short of "governmentally established religion or governmental interference with religion * * * there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." That is the aim and the effect of Title VII's reasonable accommodation requirement.

C. THE REASONABLE ACCOMMODATION PROVISION REFLECTS A CLEARLY SECULAR PURPOSE, HAS A PRIMARY EFFECT THAT NEITHER ADVANCES NOR INHIBITS RELIGION, AND AVOIDS EXCESSIVE GOVERNMENT ENTANGLEMENT WITH RELIGION

This Court has formulated, in cases involving government financial aid to religious educational institu-

tions, a three-part test to help "identify instances in which the objectives of the Establishment Clause have been impaired" (*Meek* v. *Pittenger,* 421 U.S. 349, 359). "[T]o pass muster under the Establishment Clause the law in question, first, must reflect a clearly secular legislative purpose, * * * second, must have a primary effect that neither advances nor inhibits religion, * * * and, third, must avoid excessive government entanglement with religion" (*Committee for Public Education* v. *Nyquist,* 413 U.S. 756, 773).

This case, of course, involves no financial support to any religious institution—one of the principal "evils against which the Establishment Clause protects" (*Meek* v. *Pittenger, supra,* 421 U.S. at 359)—and there may accordingly be room to argue that a less rigorous test should be applied. We do not advance such an argument, however, because the statutory provision at issue in this case so plainly satisfies each element of the three-part test.

1. The reasonable accommodation provision challenged by Parker Seal serves the same "clearly secular legislative purpose" (*Committee for Public Education* v. *Nyquist, supra,* 413 U.S. at 773) as that served by Title VII generally—"to achieve equality of employment opportunities" by "remov[ing] * * * artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification" (*Griggs* v. *Duke Power Co., supra,* 401 U.S. at 429, 431). Congress has properly determined that an individual's employment opportunities should depend

solely upon job qualifications and that one's religion—as well as one's race, nationality, and sex—should not be permitted to affect those opportunities except in the rare instance when it bears significantly on the question of job qualifications. The reasonable accommodation provision (Section 701(j) of the Act) represents a permissible legislative effort—plainly secular in purpose—to identify the circumstances in which it may fairly be said that an individual's religious practices are sufficiently relevant to his job qualifications that they may properly be taken into account in connection with an employment decision.

This secular purpose is reflected in the provision's legislative history. Section 701(j) was added in 1972 by a Senate floor amendment to the Equal Employment Opportunity Act of 1972, 86 Stat. 103. Senator Randolph, who proposed the amendment, stated that it was intended to further Title VII's guarantee of "freedom from religious discrimination in the employment of workers" and "to resolve by legislation—and in a way I think was originally intended by the [1964] Civil Rights Act—[an issue] which the courts apparently have not resolved" (118 Cong. Rec. 705, 706). That issue was the extent to which Title VII's ban on religious discrimination limited an employer's freedom to discharge or refuse to hire an individual whose religious practices or observances conflicted with the employer's work schedules. Senator Randolph referred (18 Cong. Rec. 705–706) to *Dewey* v. *Reynolds Metals Co.*, 402 U.S. 689, which had affirmed by an equally divided Court a Sixth Circuit decision

(429 F. 2d 324) sustaining the lawfulness of an employer's discharge of an employee who refused for religious reasons to work on Sundays.[12]

Senator Randolph's remarks included an expression of special concern about the dwindling membership of some Sabbatarian sects (118 Cong. Rec. 705), but the overriding theme of his observations was that the amendment was needed to eliminate "religious discrimination in * * * employment" (*ibid.*), and he agreed with Senator Dominick that the provision would protect the equal employment opportunities, not only of Sabbatarians, but also the members of any "other religious sect which has a different method of conducting their lives than do most Americans" (*id.* at 706). The aim was not to advance religion but rather, in "the spirit of religious freedom" (*ibid.*), to ensure that no individual's religious practices would needlessly restrict his work opportunities. That is a valid secular objective fully in accord with the purposes of Title VII as a whole.

That a law may, in the minds of some legislators, have a religious purpose in addition to a proper secular purpose does not, under this Court's decisions, render it invalid under the Establishment Clause. The Court's test requires only that a law reflect a valid

[12] Senator Randolph inserted into the Congressional Record the Sixth Circuit's opinion and this Court's order of affirmance in *Dewey*, a district court opinion in a similar case, and the Equal Employment Opportunity Commission's 1967 Guidelines on Discrimination Because of Religion (which imposed a reasonable accommodation requirement nearly identical to that proposed by Senator Randolph) (118 Cong. Rec. 706–730).

secular purpose. It does not mean that the law must be devoid of all religious purpose whatsoever.[13]

Furthermore, while one of Senator Randolph's purposes in proposing his amendment may have been to prevent the dwindling of the membership rolls of some religious groups, that is not, in the context of his specific proposal, a purpose to advance religion. Rather, his amendment's purpose was to assure that no individual of any faith will needlessly be required "to choose between his religious faith and his economic survival" (*Braunfeld* v. *Brown*, *supra*, 366 U.S. at 616) (Stewart, J., dissenting)—thereby necessarily also protecting religious institutions from the adverse consequences of religiously discriminatory employment practices. That is an entirely legitimate legislative objective.

We accordingly conclude that Section 701(j) "is adequately supported by legitimate, nonsectarian [governmental] interests" (*Committee for Public Education* v. *Nyquist*, *supra*, 413 U.S. at 773). That was also the conclusion of Senator Williams—chief sponsor and floor manager of the 1972 Senate bill—at the time of Senator Randolph's floor amendment. After discussing with Senator Randolph the extent of the accommodation that would be required of an employer under the proposed amendment, Senator Williams stated that he "certainly agree[d] with the objective of the amendment," that the provision ap-

[13] There is, for example, no constitutional requirement that all coincidence between the Ten Commandments and the prohibitions in the criminal code be entirely inadvertent.

peared to promote the free exercise values embodied in the First Amendment, and that he could see "no problem" with the provision under the Establishment Clause (118 Cong. Rec. 706).

2. The primary effect of the reasonable accommodation provision is the same as its secular purpose—to preserve the equal employment opportunities of individuals whose religious requirements conflict with the work schedules of their employers but can be accommodated without undue hardship. The primary effect neither advances nor inhibits religion but rather removes artificial and unnecesary barriers to employment by ensuring that a person's religion or religious observance remains "irrelevant" (*Griggs* v. *Duke Power Co.*, *supra*, 401 U.S. at 436) in connection with his job opportunities except when they significantly affect his job qualifications. As the court of appeals stated (Pet. App. 36a):

> In practice, the reasonable accommodation rule restrains employers from enforcing uniform work rules that, although facially neutral, discriminate in effect against employees holding certain religious convictions. Thus the rule guarantees job security except when accommodation of an employee's religious practices would impose an undue hardship upon the employer's business.

The accommodation requirement may incidentally benefit some religious institutions by allowing working men and women to attend religious services without forfeiting their jobs. But that was equally true of the Sunday closing laws upheld by this Court in

McGowan v. *Maryland, supra,* and its companion cases. See, also, *Zorach* v. *Clauson, supra.* Indeed, this Court has repeatedly recognized that "not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon religious instituions is, for that reason alone, constitutionally invalid" (*Committee for Public Education* v. *Nyquist, supra,* 413 U.S. at 771). The statute here does not compel church attendance or religious contributions, nor does it limit its protection to persons whose religious observance includes organized religious activity.

Parker Seal objects to the statute on the ground that it "confer[s] special benefits on a class of persons determined strictly on religious grounds" (Br. 33). But when the evil that Congress seeks to eradicate—employment discrimination because of religion—itself affects "a class of persons determined strictly on religious grounds" (*ibid.*), a legislative prohibition of the offensive conduct does not "confer special benefits" on the affected class but merely relieves its members of a special burden that others do not suffer.

This Court's decisions demonstrate the fallacy of Parker Seal's "special benefits" argument. If it is not a violation of the Establishment Clause to pay unemployment compensation benefits to a claimant solely because her apparent ineligibility is a function of Sabbatarian religious observances (*Sherbert* v. *Verner, supra*), to exempt from the operation of Sunday closing laws a class of persons whose religious beliefs require the observance of some other day as the Sabbath (*Braunfeld* v. *Brown, supra*), to excuse from compliance with compulsory school attendance

laws persons whose religious beliefs and practices conflict with such a requirement (*Wisconsin* v. *Yoder, supra*), or to release from public school attendance a class of students who wish to go to religious centers for religious instruction or devotional exercises (*Zorach* v. *Clauson, supra*), then neither does it violate the Establishment Clause to extend equal employment opportunity protection to a class of individuals whose religious observances might otherwise needlessly cost them their jobs.

Nor does the reasonable accommodation rule "'effect . . . favoritism among sects'" (Pet. Br. 30). The statute on its face applies to "*all* aspects of religious observance and practice" (emphasis added), and the legislative history confirms that no one sect or group of sects was intended to be singled out for protection to the exclusion of others (see p. 41, *supra*). As in *Gillette* v. *United States, supra,* 401 U.S. at 450–451, "no particular sectarian affiliation or theological position is required," and the statute "does not single out any religious organization or religious creed for special treatment."[14]

If, by its operation, the statute protects from needless loss of employment only those workers whose religious beliefs require them to behave in a way that conflicts with their employers' work schedules (see

[14] The Equal Employment Opportunity Commission has adopted, in its application of the reasonable accommodation requirement, the same broad definition of religion that this Court applied in *United States* v. *Seeger*, 380 U.S. 163, and *Welsh* v. *United States*, 398 U.S. 333, in connection with the military conscientious objector provision. *E.g.*, EEOC Decision No. 76–104 (April 2, 1976), reported at CCH EEOC Dec. ¶ 6500.

Pet. Br. 30–31), that is not legislative favoritism of some religious sects over others. It merely defines the class of workers whose employment opportunities would otherwise be reduced because of "unnecessary barriers" (*Griggs* v. *Duke Power Co., supra,* 401 U.S. at 431) that Congress—for valid secular reasons—sought to eliminate.

Parker Seal's favoritism argument is essentially the same as the one rejected in *Gillette,* where the Court found "a neutral, secular justification" (401 U.S. at 460) for exempting from military service only those conscientious objectors who were opposed to participation in war in any form and not those who were opposed to participation in a particular war only. The contention there, like the company's assertion here, was that the statutory provision "work[ed] a de facto discrimination among religions" (*id.* at 451–452) by favoring those whose doctrine brought their adherents within the scope of the exemption.

As in *Gillette,* the statute here serves "valid purposes having nothing to do with a design to foster or favor any sect, religion, or cluster of religions" (*id.* at 452), and its provisions are "focused on individual conscientious belief, not on sectarian affiliation" (*id.* at 454). Indeed, the statute here, unlike that in *Gillette,* is not even arguably "underinclusive" (*id.* at 452). The protected class here is fully coextensive with the class of persons who might otherwise be subjected to needless restrictions on employment opportunities on account of their religious practices.

In sum, the primary effect of the reasonable accommodation provision is "not to support, favor,

advance, or assist" religion generally or some religions in particular (*Wisconsin* v. *Yoder, supra,* 406 U.S. at 234–235, n. 22). Rather, it is to prevent employment discrimination on the basis of an individual's religious practices by requiring employers to accommodate such practices if they can reasonably do so without undue hardship in the conduct of their business. That the statute thereby allows working persons to practice their religion "free from the heavy impediment" (*ibid.*) that such discrimination would otherwise impose does not render the provision unconstitutional. On the contrary, it tends to further the interests of the Establishment Clause by allowing for religious diversity and pluralism——"mak[ing] room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary" (*Zorach* v. *Clauson, supra,* 343 U.S. at 313)—thereby avoiding conditions that might favor the formation of "government-established churches" (*Everson* v. *Board of Education,* 330 U.S. 1, 9). The reasonable accommodation provision reflects a wholly proper "attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma" (*Zorach* v. *Clauson, supra,* 343 U.S. at 313).

3. The statute involves no excessive government entanglement with religion. As the court of appeals correctly stated, "the reasonable accommodation requirement will not subject religious institutions to the sort of 'comprehensive, discriminating, and continuing [governmental] surveillance' that the Supreme Court

found impermissible in *Lemon* v. *Kurtzman*, 403 U.S. 602, 619"; the statute and regulation "require little or no contact between religious institutions and governmental entities" (Pet. App. 38a).

Parker Seal sees the danger of excessive entanglement in the need for "extensive review, first by the EEOC and then by the courts, of every phase of the employee's religious claim" (Br. 34). The contention was correctly answered by the court of appeals (Pet. App. 38a–39a):

> For the most part, the EEOC and the courts will have to determine simply whether the employer has made a reasonable accommodation and whether an undue hardship will result. These issues will be considered in the labor relations context, and their resolution certainly does not necessitate any government entanglement with religion.
>
> [Parker Seal] suggests, however, the EEOC investigators will be forced to study and to evaluate the dogma of the many religious sects in order to ascertain whether employees' practices and observances are genuinely religious and therefore protected under Title VII. In most cases, this issue probably will not be disputed seriously. To the extent that the question does arise, however, we think that it will require no more government involvement in religion than the concededly nonexcessive entanglement that occurs when a state must determine whether a purported church qualifies for a property tax exemption. See *Walz* v. *Tax Comm'n*, 397 U.S. 664, 674–76 (1970); *id.* at 698–99 (opinion of Harlan, J.).

Contrary to Parker Seal's interpretation of the legislative history of Section 701(j) (Br. 34–35), the flexibility and discretion with which Congress believed the statute would be administered refer not to judgments concerning the sincerity of an employee's beliefs or the tenets of his religion but rather to the pragmatic determinations concerning reasonableness and undue hardship in the circumstances of particular cases. Although some inquiry into sincerity may occasionally be required, that has not generally been an issue in cases involving the reasonable accommodation requirement.[15]

The government's involvement with religious institutions under the statute "can hardly be characterized as * * * active" (*Wisconsin* v. *Yoder, supra*, 406 U.S. at 234, n. 22). Rather, it would be "'quick and non-judgmental'" (*Roemer* v. *Maryland Public Works Bd.*, No. 74–730, decided June 21, 1976, slip op. 26 (plurality opinion)).

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[15] See, *e.g.*, *Reid* v. *Memphis Pub. Co.*, 468 F. 2d 346, 348 (C.A. 6); *Riley* v. *Bendix Corp.*, 464 F. 2d 1113, 1114 (C.A. 5); *Dewey* v. *Reynolds Metals Co.*, *supra*, 429 F. 2d at 335; *Dawson* v. *Mizell*, 325 F. Supp. 511, 513 (E.D. Va.); *Jackson* v. *Veri Fresh Poultry Co.*, 304 F. Supp. 1276, 1278 (E.D. La.).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
J. STANLEY POTTINGER,
Assistant Attorney General.
LAWRENCE G. WALLACE,
Deputy Solicitor General.
MARK L. EVANS,
Assistant to the Solicitor General.

BRIAN K. LANDSBERG,
DENNIS J. DIMSEY,
JOHN C. HAMMOCK,
Attorneys.

ABNER W. SIBAL,
General Counsel,
JOSEPH T. EDDINS,
Associate General Counsel,
BEATRICE ROSENBERG,
CHARLES L. REISCHEL,
LUTZ ALEXANDER PRAGER,
GERALD D. LETWIN,
Attorneys,
Equal Employment Opportunity Commission.

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